

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DARNELL MCINTOSH,

Defendant-Appellant.

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UNPUBLISHED

January 25, 2007

No. 263394

Kent Circuit Court

LC No. 04-004595-FC

Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of voluntary manslaughter, MCL 750.321, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent sentences of 1 to 7-1/2 years' imprisonment for the felon in possession of a firearm conviction and 5 to 20 years' imprisonment for the voluntary manslaughter conviction. The court also sentenced defendant to a consecutive sentence of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right his conviction of voluntary manslaughter. We affirm.

I

Although there was conflicting testimony concerning the details of the shooting in this case, the general sequence of events leading to the shooting was undisputed.<sup>1</sup> On March 20, 2004, in the early morning hours, defendant and a group of his friends, which included Rasheed Milton, Andrew Hill, Danny White, and Jerome Cross, left Club Platinum in Grand Rapids and walked across the street to the parking lot. Milton and Hill engaged in a verbal altercation, and Milton subsequently pulled out a gun, pointing it at Hill. As Milton and Hill struggled for the gun, it discharged at least once, hitting Milton. Nevertheless, Milton and Hill continued their fight. White and Cross then began fighting. Milton, after being shot, interceded in the fight between White and Cross, apparently to assist Cross, who was Milton's brother. Cross ran, and

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<sup>1</sup> For purposes of this appeal, the facts are recited from testimony and evidence presented, recognizing that certain details were controverted.

White and Milton began to fight. A crowd of people leaving the area clubs had gathered in the parking lot to watch the fights. Defendant ended up with the gun that was initially possessed by Milton. After yelling at the crowd to back up, defendant fired the gun at least twice. After defendant fired the gun, the crowd scattered. Included in the crowd was Marcus Tolliver. Tolliver died after being hit by two gunshots, which were positively identified as being fired from the gun that defendant possessed and later turned in, through his attorney.

## II

Defendant first claims on appeal that the trial court erred in refusing to instruct the jury on reckless discharge of a firearm, MCL 752.861. He argues that, on the facts of the present case, the requested charge was a necessarily included lesser offense of the charged crime, second-degree murder, MCL 750.317. We review de novo a claim of instructional error. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003).

A trial court is required to instruct the jury on all appropriate necessarily included lesser offenses of the charged crime, but is prohibited from instructing the jury on cognate lesser offenses. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Cornell*, 466 Mich 335, 354-357; 646 NW2d 127 (2002). The elements of a necessarily included lesser offense are “completely subsumed in the greater offense.” *People v Mendoza*, 468 Mich 527, 532 n 3; 664 NW2d 685 (2003). “Thus, with a necessarily included lesser offense, ‘it is impossible to commit the greater [offense] without first having committed the lesser.’” *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003), quoting *Cornell*, *supra* at 345. A cognate lesser offense shares some elements with the greater offense, but it also has some elements not found in the greater offense. *Id.* at 173.

The offense of reckless discharge of a firearm requires that a firearm be carelessly, recklessly, or negligently discharged causing death or injury. *Id.* at 174. The offense of second-degree murder requires a death caused by an act of the defendant done with malice and without justification or excuse. *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002). Because second-degree murder does not require the use of or discharge of a firearm, a person can commit second-degree murder without committing reckless discharge of a firearm. See *Lowery*, *supra* at 174. Accordingly, reckless discharge of a firearm is not a necessarily included lesser offense of second-degree murder. See *id.* at 173. Thus, defendant was not entitled to have the jury instructed on reckless discharge of a firearm. *Cornell*, *supra* at 359. The trial court did not err in refusing defendant’s request to instruct the jury on reckless discharge of a firearm.

## III

Defendant also claims on appeal that his conviction of voluntary manslaughter was against the great weight of the evidence. Defendant specifically argues that the great weight of the evidence established that defendant never intended to shoot anyone, and the shots that hit Tolliver were not fired by defendant. He asserts that all the witnesses except Hill testified that defendant shot the gun straight up in the air and that Hill, while testifying that defendant shot the gun straight ahead, testified that defendant shot the gun into an area where nobody was standing.

We review for an abuse of discretion a trial court's decision to deny a motion for a new trial on the basis that the verdict was against the great weight of the evidence. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). We will reverse a conviction only if the verdict "does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (citation omitted).

Voluntary manslaughter, like murder, requires "a death caused by defendant, with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result."<sup>2</sup> *Mendoza, supra* at 540. A defendant's intent is generally a question of fact to be inferred from the circumstances by the trier of fact. *People v Tower*, 215 Mich App 318, 323; 544 NW2d 752 (1996).

In the present case, defendant shot the gun within close range of a large crowd that had gathered in the parking lot to watch the fights. A reasonable trier of fact could infer that defendant shot the gun with the intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result since he fired the gun, in the midst of the scuffles, within close range of a large crowd. *Mendoza, supra* at 540. This is particularly so given the range of testimony concerning the shots fired. Accordingly, there was reasonable support in the evidence for the jury's conclusion that defendant had the necessary intent to commit voluntary manslaughter. *DeLisle, supra* at 661.

There was also reasonable support in the evidence for the jury's conclusion that Tolliver was hit by gunshots fired by defendant. The ballistics tests confirmed that Tolliver was shot by the gun that defendant subsequently turned over to his attorney. Testimony given at trial also established that this same gun was fired on two separate occasions at the scene of the shooting. It was first fired while Milton and Hill struggled over it. It was later fired by defendant while Milton and White were fighting. The crowd scattered after defendant fired the gun.

Various testimony supports a conclusion that Tolliver was shot when defendant fired the gun, rather than when it was first fired during Hill and Milton's tussle. According to Eric Hendrix, Tolliver was standing next to him in the parking lot while Milton and White were fighting. Mary Margaret Cook and Daryle Robbison testified that Tolliver ran in between their vehicles as the crowd scattered. Finally, Cook and Sharde Upton testified that they did not hear any more gunshots after they heard the gunshots that scattered the crowd. Accordingly, there was reasonable support in the evidence for the jury's conclusion that Tolliver was hit by gunshots fired by defendant. *Id.* at 661. Defendant's conviction of voluntary manslaughter was not against the great weight of the evidence, and a new trial was unwarranted.

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<sup>2</sup> However, the distinguishing element in murder, malice, is negated by the presence of provocation and heat of passion. *Mendoza, supra* at 540.

Affirmed.

/s/ David H. Sawyer

/s/ Janet T. Neff

/s/ Helene N. White